CRIMINAL YEAR SEMINAR

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Webinar

Evidence Update

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2019-2020 Evidence Update

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1

OPINIONS AND MEMORANDUM DECISIONS FROM THE ARIZONA SUPREME COURT AND ARIZONA COURT OF APPEALS

	Total	Memo.	Ops.	Not Crim.	Crim.
2017	2,216	2,025	191	115	76
2018	2,025	1,829	196	120	76
2019	1,552	1,414	138	88	49

2

ARTICLE 1. GENERAL PROVISIONS.

Rule 104(a). Preliminary Questions — Questions of admissibility generally.

Lietzau, 246 Ariz. 380, 439 P.3d 839 (Ct. App. 2019): Probation officer arrested Lietzau for probation violation, and trial court granted his motion to suppress search of his cell phone; Lietzau contended there was no testimony showing probation officer acted reasonably.

3

104.a.060 The trial court is not bound by the Rules of Evidence in determining admissibility of evidence, thus hearsay is generally admissible at a suppression hearing.

4

¶ 13 & n.1: Because trial court declined to hear state's probation department witness, there was no testimony about arresting officer's motivation in searching Lietzau's phone; because motions filed with trial court contained transcribed interview of surveillance officer, and because trial court stated it read the parties' "responses," appellate court could consider that hearsay in determining whether trial court abused discretion in granting Lietzau's motion to suppress; court found abuse of discretion and reversed trial court.

5

Rule 106. Remainder of or Related Writings or Recorded Statements.

Champagne, 247 Ariz. 116, 447 P.3d 297 (2019): On March 3, 2012, Champagne was arrested on unrelated charges; on March 4, 2013, while in jail, he told informant that, if police found the bodies "he would face the death penalty because of his criminal past";

6

on March 8, state charged Champagne with murder; on March 19, after he was indicted, detective obtained a statement from him, which the trial court subsequently suppressed; after trial court admitted the March 4 statement, Champagne sought to introduce portion of March 19 statement wherein he said "he didn't think they had a death penalty case on him," contending state "opened the door" to that statement under Rule 106; trial court declined his request.

7

106.015 If the portion of the statement that the party wants admitted does not qualify, explain, or place in context the portion of the statement that is already admitted, or if the portion of the statement that the party wants admitted is not relevant, the trial court should not admit the requested portion.

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¶ 45: Court held statement Champagne sought to introduce was not needed (1) to complete statement already introduced, (2) to avoid introduced statement from being taken out of context, or (3) to prevent juror confusion;

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rather, it was separate statement from entirely separate conversation that occurred on separate date, and that fact that Champagne made contradictory statements 15 days apart did not somehow make those two statements one continuous utterance; thus trial court properly ruled that Rule 106 did not apply; further, court held trial court acted within its discretion in precluding Champagne's March 19 statement under Rule 403.

10

ARTICLE 3. PRESUMPTIONS IN CIVIL ACTIONS AND PROCEEDINGS

Rule 301. Presumptions in Civil Cases Generally — Community Property.

In re DeFrancisco, 248 Ariz. 23, 455 P.3d 722 (Ct. App. 2019): Husband was long-time employee of Houston Astros baseball organization and in 2017 was manager of Astros' AAA minor league affiliate team; on June 23, 2017, husband served petition for dissolution on wife; after Astros won World Series in October 2017, team paid husband bonus of $28,151.26; wife contended trial court erred in concluding this was husband's separate property.

11

380.090 The general rule is that property acquired by a spouse after service of a petition for dissolution that results in a dissolution is that spouse's separate property, except for property received as a result of an enforceable contractual right, such as property acquired as a result of services rendered during the marriage, and the other spouse has the burden of showing the property is community property.

12

¶¶ 11: Court concluded this was not enforceable contractual right or property acquired as result of services rendered during marriage, thus trial court did not err in determining this was husband's separate property.

13

In re Hefner, 248 Ariz. 54, 456 P.3d 20 (Ct. App. 2019): Husband contended trial court erred by treating his personal-injury damages related to two automobile accidents as community property.

14

380.080 "Acquired" as used in A.R.S. § 25–211(A) was not meant to apply to compensation for an injury to the person that arises from the violation of the right of personal security, which right a spouse brings to the marriage; accordingly, compensation for an injury to a spouse's personal well-being belongs to that spouse as separate property, and the spouse seeking to overcome a presumption of asset characterization has the burden of establishing the character of the property by clear and convincing evidence.

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¶ 12 Court held trial court erred by awarding wife half of personal injury awards without evidence that the community was entitled to any of the award and remanded to allow wife to establish amount, if any, to which community was entitled.

16

ARTICLE 4. RELEVANCY AND ITS LIMITS

Champagne, 247 Ariz. 116, 447 P.3d 297 (2019): Champagne contended trial court abused its discretion by refusing to permit him to cross-examine witness about her mental illness diagnoses and drug usage, maintaining her bipolar disorder, post-traumatic stress disorder, and depression spoke to her ability to perceive events accurately, as did fact she was not medicated for those disorders and was drinking alcohol and using methamphetamine before crimes occurred.

17

401.imp.030 Before a party may introduce evidence about the witness's mental condition or drug use in an attempt to impeach the witness's ability to perceive, remember, or relate, the party must make an offer of proof of evidence sufficient for the jurors to find that the witness's mental condition or drug use did have an effect on the witness's ability to perceive, remember, or relate.

18

¶¶ 52–54 Court held trial court properly precluded Champagne from asking whether prescription medication witness was taking during trial was mental health medication because Champagne failed to present sufficient evidence suggesting connection between any medication and her ability to recall and observe matters to which she testified;

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further, trial court properly precluded evidence of witness's mental health diagnoses or her failure to take medication for those diagnoses because Champagne failed to show witness's ability to observe and relate events surrounding murders was affected in any way by her mental health diagnoses or her failure to take medication for those diagnoses.

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Rule 404(b). Other crimes, wrongs, or acts (Criminal Cases).

Gentry, 247 Ariz. 381, 449 P.3d 707 (Ct. App. 2019): Victim (M.R.) and Gentry's step-daughter (Autumn) had son together; Gentry was charged with killing M.R., and claimed justification in protecting Autumn; Gentry contended the trial court erred when it precluded "other act" evidence that Autumn was pregnant when M.R. assaulted her on two occasions, claiming the court applied the incorrect relevancy standard and prevented him from presenting his justification defense.

21

404.b.cr.600 The trial court may exclude evidence of other crimes, wrongs, or acts under Rule 403 if the opponent objects on that basis and trial court determines that the probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, or misleading the jurors, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence; because this is an extraordinary remedy, it should be used sparingly.

22

¶¶ 14–21: Court noted trial court allowed Gentry to introduce following other act evidence for M.R.: (1) in August 2015, M.R. hit and damaged wall of Gentry's freezer; (2) in August 2015, M.R. hit Autumn in face with table when she was pregnant; (3) in December 2015, M.R. pushed Autumn to ground when she was pregnant, causing her to go into early labor;

23

(4) in March 2016, while M.R. was holding their baby, he attempted to kick Autumn and fell to the ground, hitting baby's head; and (5) on date of the offense, M.R. pushed Autumn, and their son had signs of physical abuse on his body. Court held trial court properly allowed admission of these other acts, and properly exercised its discretion in precluded evidence that Autumn was pregnant in (2) and (3).

24

Rule 404(c) — Character evidence in sexual misconduct cases (Criminal Cases).

Rose, 246 Ariz. 480, 440 P.3d 999 (Ct. App. 2019): Rose was convicted of sexual conduct with minor that he committed when he was 36 to 38 years of age; Rose contended trial court erred in admitting evidence of his juvenile adjudication for child molestation.

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404.c.cr.020 This section allows admission of evidence of other crimes, wrongs, or acts, and makes no distinction between the admission of evidence of another crime, wrong, or act a person committed as a juvenile and one the person committed as an adult.

¶¶ 8–12: Court held rule on its face did not preclude evidence of juvenile adjudication, and declined Rose's invitation for court to add to rule, by judicial fiat, an additional restriction on admission of such other-acts evidence, namely, that no evidence of act committed when a person was a juvenile may be admitted.

26

ARTICLE 5. PRIVILEGES

Rule 501. Privilege in General — Physician-Patient Privilege.

R.S. v. Thompson (Vanders), 247 Ariz. 575, 454 P.3d 1010 (Ct. App. 2019): Vanders was charged with second-degree murder of his long-time girlfriend; on his request, trial court ordered hospital to disclose, for *in camera* review, deceased victim's 6-year-old mental health records; victim's siblings challenged that ruling.

27

501.05.020 The physician-patient privilege does not yield to the request of a criminal defendant for information merely because that information may be helpful to the defendant's defense; to be entitled to an *in camera* review of privileged records as a matter of due process, the defendant must establish a substantial probability that the protected records contain information critical to an element of the charge or defense, or that their unavailability would result in a fundamentally unfair trial.

28

¶¶ 9–28: Court held that, because Vanders did not establish substantial probability that protected records contained information critical to element of charge or defense, or that their unavailability would result in fundamentally unfair trial, trial court erred by granting *in camera* review of victim's privileged records.

29

ARTICLE 6. WITNESSES

Rule 602. Need for Personal Knowledge.

Murray (Easton), 247 Ariz. 447, 451 P.3d 803 (Ct. App. 2019): Prosecutor asked victim if he recognized what was depicted in photograph that appeared to show dark-colored bale wrapped in clear plastic, and victim said no; prosecutor then asked if victim thought he knew what photograph depicted,

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trial court overruled Murray's objection that question had been asked and answered, prosecutor restated question, asking victim if he "[knew] what [the photograph] might be," and victim said, "No. I don't know what was in the black bag"; prosecutor then asked, "Do you think you know what [photograph is] even though it doesn't look familiar to you?" victim then answered, "I think I know what it is, it was in the house"; when asked what he thought it was, victim replied that it was marijuana; Murray contended witness lacked personal knowledge.

31

602.010 For a witness to testify about a matter, the witness must have personal knowledge of the matter.

¶¶ 10–12: Court held trial court had discretion to allow prosecutor to continue to probe victim about contents of photograph even after victim initially expressed unfamiliarity with it, and that ultimate answer could be admissible inference from personal knowledge and experience; and further held, because answer was cumulative to other evidence that Murray had brought marijuana to residence, any error was harmless.

32

Rule 604. Interpreters.

Murray: Victim testified that, during confrontation, he heard Murray said to his brother in Jamaican Patois "shoot him, shoot the boy"; Murray contended allowing the victim to translate the words he heard was improper because the victim was not "a trained interpreter, and certainly not neutral."

33

604.070 There is no authority for the proposition that only a "trained interpreter" may testify in English to the meaning of words heard in another language, thus a witness who is bilingual may testify in English to the meaning of what he or she personally heard and understood in another language.

¶¶ 5–6: Court concluded the victim's testimony in English to the meaning of what he heard in Jamaican Patois was proper, and no error occurred.

34

ARTICLE 7. OPINION AND EXPERT TESTIMONY

Rule 701. Opinion Testimony by Lay Witnesses.

Fuentes, 247 Ariz. 516, 452 P.3d 746 (Ct. App. 2019): Fuentes sought to elicit testimony from the state's crime scene technician that he had seen a shoe print behind the downed fence that might have been consistent with the victim's shoes;

35

technician mentioned at pretrial hearing that he observed shoe prints that "might look similar to the ones that the deceased's shoes may have created"; trial court asked, "And did you make that decision or did someone tell you that?"; technician replied: "[T]he detective at the time I believe said that they felt that it was—that the prints looked very similar to the shoes that the deceased [was] wearing"; based on that testimony, trial court concluded it was "absolutely clear from [technician] that he was giving opinions based on what other people told him."

36

701.020 A witness who is not testifying as an expert may give testimony in the form of an opinion if the opinion is limited to one that is (a) rationally based on the witness's perception, (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

37

¶¶ 26–29: court held trial court did not abuse discretion in determining technician was not qualified to provide opinion testimony in question because it was not based on his own perceptions.

38

Rule 702. Testimony by Expert Witnesses.

Murray: Detective testified that evidence he saw was consistent with shipping practices common to marijuana trade; on appeal, Murray contended state had not established detective was qualified as expert;

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702.020 A witness may be qualified as an expert by knowledge, skill, or experience.

¶¶ 13–14: Court noted detective testified to extensive experience that would have qualified him as expert, including participation in several hundred drug-trafficking investigations, and thus was qualified to give expert opinion.

40

Rule 702(a). Assist trier of fact.

Malone, 247 Ariz. 29, 444 P.3d 733 (2019): Malone contended his proffered expert testimony about brain damage was not to prove he was incapable of reflecting, but, was instead offered to demonstrate brain condition that rendered it less likely that he may have done so.

41

702.a.070 Because the Arizona legislature has declined to adopt a defense of diminished capacity, a defendant is precluded from maintaining that he or she cannot reflect upon his or her actions (or has a lesser capacity to do so); the defendant may, however, present evidence of defendant's behavioral tendencies to challenge the *mens rea* of premeditation for a first degree murder charge.

42

¶¶ 8–21: Court concluded Malone's proffered evidence was mental disease or defect evidence, and thus was inadmissible either to show Malone's inability to form *mens rea* or a likelihood he failed to do so, and thus could not be used to negate *mens rea*.

43

ARTICLE 8. HEARSAY

Rule 803(5).Exceptions — Recorded recollection.

Giannotta, 248 Ariz. 82, 456 P.3d 1256 (Ct. App. 2019): Giannotta was charged with stealing a AR-15 semi-automatic rifle; victim had his receipt, which listed the serial number, and reported the theft to the police;

44

when the officer took the formal report, the victim provided rifle's serial number; victim testified at trial but did not recall rifle's serial number, and instead described reading serial number to police officer who made formal report; when that officer testified, he recited serial number based on his written report documenting number victim gave him; Giannotta contended the testimony about the serial number was hearsay.

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803.5.015 The exception for recorded recollections allows for admission of jointly constructed records (one person makes an oral statement, another writes it down) as long as each person in the chain testifies to performing his or her role accurately, or the record permits an inference that the person performed his or her role accurately.

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¶¶ 11–19: Court stated that, although victim did not expressly testify he recited serial number accurately, circumstances permitted inference of accuracy; although officer did not expressly avow that he recorded number accurately, his testimony allowed inference of accuracy; accordingly, serial number as reflected in officer's report was admissible as jointly constructed recorded recollection created by victim and officer.

47

ARTICLE 9. AUTHENTICATION AND IDENTIFICATION

Griffith, 247 Ariz. 361, 449 P.3d 353 (Ct. App. 2019): Griffith appealed his conviction and sentence for trafficking in stolen property; the issue was whether incriminating digital evidence—a Facebook message and search history log—was properly authenticated at trial.

48

Victims' home had been burglarized and three Apple iPads were missing. Based on information victims acquired from Apple, police were able to identify Brandon Griffith. Police interviewed Griffith, who explained that others frequently brought him computer devices to restore to their factory settings, which he did even when he suspected the devices were stolen. Griffith faintly recalled that R.H., the suspect in the police's burglary investigation, had once brought him three iPads to reset.

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Griffith said he communicated with R.H. through Facebook, prompting the police to obtain a search warrant for Griffith's Facebook account. In response, Facebook produced, among other things, a message sent from Griffith's account and a log of the account's search history. The message was a reply from Griffith offering to sell an iPad and containing a photograph of the iPad, which had the same serial number as one stolen from the victims. Griffith contended the superior court abused its discretion by admitting the Facebook records because they "were hearsay, were not subject to any exception, and were not authenticated."

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The state contended the Facebook message was a business record.

Rule 803(6). Exceptions — Records of regularly conducted activity.

803.6.010 This exception allows for admission of a memorandum, report, record, or data compilation if made at or near the time of the underlying event.

51

803.6.020 This exception allows for admission of a memorandum, report, record, or data compilation if the information is either compiled or transmitted by someone with firsthand knowledge.

¶¶ 5–10: Court held state failed to satisfy requirement that statement was made at or near time by someone with first-hand knowledge.

52

Rule 901(a). Authenticating and Identifying Evidence — General provision.

901.a.010 For the matter in question to be admissible in evidence, the proponent need only present sufficient evidence from which the trier-of-fact could conclude the matter in question is what the proponent claims it to be; whether the matter in question is in fact what the proponent claims and whether it is connected to the litigation is a question of weight and not admissibility, and is for the trier-of-fact.

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¶¶ 11–13; Court held Facebook records custodian would not be able to provide information from which the jurors could conclude Griffith authored message.

54

Rule 801(d)(2)(a) —Statements that are not hearsay: Party-opponent's own admission.

801.d.2.a.005 A party's statement is admissible.

¶ 14 Court stated that, because record contained evidence from which jurors could reasonably conclude that message was authored by Griffith himself, trial court did not abuse discretion in admitting that evidence.

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¶¶ 14–16: Court noted Facebook account from which the message was sent used Griffith's name; detective who obtained records testified she requested them by uploading search warrant through specific web page solely for law enforcement, and Facebook delivered the records to her through that same page;

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Griffith stated he performed factory reset on only one of three iPads he had been given by burglary suspect; consistent with that statement, Apple records show new registry in Griffith's name for only one iPad; photograph of that particular iPad was attached to message sent from Griffith's Facebook account; court held this was sufficient evidence from which jurors could reasonably find that Griffith himself sent message, thus trial court did not abuse its discretion in admitting message.

58

¶¶ 17–19; Griffith contended trial court erred in admitting log showing searches made by Griffith's Facebook account; because there was sufficient evidence from which jurors could find Griffith authored those searches, trial court did not abuse discretion in admitting that evidence.

59